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No. 08-736

Supreme Court, U.S.
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In The
Supreme Court of the United States

JAMES FONTENEAUX,

Petitioner,

v.

SHELL OIL CO. AND SHELL INFORMATION TECHNOLOGY INTERNATIONAL INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

A. MARTIN WICKLIFF, JR.*
JENNIFER J. COOPER
DANIEL J. SCHUCH
EPSTEIN BECKER GREEN WICKLIFF & HALL, P.C.
1000 Louisiana Street, Suite 5400
Houston, Texas 77002
Telephone: (713) 750-3100
Facsimile: (713) 750-3101
**Counsel of Record*
Counsel for Respondents Shell Oil Co. and Shell Information Technology International Inc.

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

COUNTER STATEMENT OF THE QUESTION PRESENTED FOR REVIEW

Whether a Plaintiff's cause of action for discriminatory failure-to-promote under 42 U.S.C. § 1981 should be governed by the four (4) year statute of limitations set forth in 28 U.S.C. § 1658(a) when the promotion at issue would create a new and distinct employment relationship between the employee and employer?

PARTIES BELOW AND PARENT COMPANIES

The Petition correctly states the names of the parties as they have been identified throughout this litigation. In 2005, Royal Dutch Petroleum Company and The "Shell" Transport and Trading Company, plc merged to create Royal Dutch Shell, plc a publicly-traded company. Shell Oil Company and Shell Information Technology International Inc. are 100% owned indirectly by Royal Dutch Shell, plc.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Shell Oil Co. and Shell Information Technology International Inc. (collectively referred to as "Shell") respectfully request the Court to deny the Petition for a Writ of Certiorari, seeking review of the judgment of the United States Court of Appeals for the Fifth Circuit.

I. OPINIONS BELOW

The Opinion Memorandum and Order of the United States District Court for the Southern District of Texas, Houston Division, granting summary judgment in favor of Shell, is unreported and contained in the Appendix to the Petition. App. 12a. The *per curiam* opinion of the Fifth Circuit Court of Appeals, affirming the Opinion Memorandum and Order of the District Court, is also unreported and contained in the Appendix to the Petition. App. 1a. The *per curiam* Order of the Fifth Circuit, denying Petitioner's Petition for Rehearing, is also contained in the Appendix to the Petition. App. 32a.

II. JURISDICTION

Jurisdiction in the first instance was conferred on the United States District Court for the Southern District of Texas, Houston Division, pursuant to 28 U.S.C. § 1331. The District Court entered final judgment on August 22, 2007. Judgment of the United States Court of Appeals for the Fifth Circuit was

entered on July 30, 2008. A Petition for Rehearing was denied by Order dated August 26, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

III. STATUTES INVOLVED

The Petition accurately sets forth the pertinent statutory provisions.

IV. STATEMENT OF THE CASE

A. Factual Background

Petitioner was employed by Shell between 1976 and 2005. In July 2003, Petitioner was notified that he would not be awarded a promotion to a new position within the company. The District Court and Fifth Circuit found the promotions sought by Petitioner involved the ability to make employment decisions as a Shell supervisor/manager, duties which Petitioner did not have in his previous position. Petitioner was ultimately denied the promotion due to his lack of qualifications required for the new position. App. 19a. After filing a charge of discrimination with the Equal Employment Opportunity Commission, Petitioner filed the instant lawsuit with the United States District Court for the Southern District of Texas, Houston Division, asserting a claim for, among others, discriminatory failure-to-promote under 42 U.S.C. § 1981.

B. Procedural Background

Petitioner filed his original complaint with the Southern District of Texas on November 23, 2005. Thereafter, Shell filed its Motion for Summary Judgment on May 18, 2007. Following a response to the motion and subsequent reply, U.S. District Judge Keith P. Ellison GRANTED Shell's Motion, and summarily dismissed Petitioner's lawsuit. Judge Ellison issued an Opinion Memorandum and Order in support of his decision, dated August 22, 2007. App. 12a. Petitioner appealed the District Court's decision to the Fifth Circuit Court of Appeals. The Fifth Circuit issued a *per curium* opinion on July 30, 2008, affirming the District Court's summary dismissal of the matter.[1] App. 1a. The Fifth Circuit, applying this Court's reasoning in *Patterson v. McLean Credit Union*,[2] stated, in relevant part:

> In deciding whether a change of position rises to the level of a new and distinct relation, the court must compare the employee's current duties, salary, and benefits with those incident to the new position. . . . Where a routine promotion involves the attainment of supervisory status, that alone does not create a new and distinct employment

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[1] The Fifth Circuit's *per curiam* Opinion was issued by Carl E. Stewart, Priscilla Richman Owen and Leslie H. Southwick.

[2] 491 U.S. 164, 185, 109 S. Ct. 2363, 105 L. Ed. 2d 132 (1989) *superseded by statute on other grounds as stated in CBOCS West, Inc. v. Humphries*, 128 S. Ct. 1951, 170 L. Ed. 2d 864 (2005).

> relationship. However, a non-routine promotion that involves the attainment of supervisory status may be categorized as creating a new and distinct employment relationship. There is no evidence that Fonteneaux had any supervisory capacity in his [previous] position. The promotions which he sought involved the ability to make employment decisions as a Shell manager. A promotion that would allow an employee to hire and fire subordinates is the type of relationship that creates a new and distinct employment relationship. . . . Therefore, the two-year Texas statute of limitations applied. . . . These claims are therefore barred.

App. 8a (internal citations omitted). Petitioner filed a timely Petition for Rehearing to the Fifth Circuit, which was denied August 26, 2008. The instant Writ of Certiorari was placed on this Court's docket December 9, 2008. The thrust of Petitioner's argument in support of his Petition is that failure-to-promote claims under 42 U.S.C. § 1981 should be universally subject to the four (4) year "catch-all" statute of limitations contained in 28 U.S.C. § 1658(a), irrespective of the nature of the promotion at issue.

V. PETITIONER'S WRIT OF CERTIORARI SHOULD BE DENIED

Petitioner has failed to raise a "compelling reason" for the Court to grant his Petition for Writ of Certiorari ("Petition"). *See* Sup. Ct. R. 10. Contrary to the requirements of the Rules of the Supreme Court

of the United States, the Petition presents no criteria warranting the Court's review. Instead, Petitioner requests the Court to review a decision based upon an established line of jurisprudence and supported by the clear legislative intent of relevant statutes.

Petitioner ultimately seeks reversal of well established judicial precedent extending the principle of law articulated by this Court in *Patterson*, not because Congress has changed the plain, and intentionally chosen, statutory language of the Judicial Improvements Act of 1990 § 313, 28 U.S.C. § 1658; but, because Petitioner is dissatisfied with *Patterson*'s effect on the outcome of his case.

There is no conflict with the Fifth Circuit's *per curiam* opinion and well-established jurisprudence addressing the applicable statute of limitations to causes of action filed under 42 U.S.C. § 1981. Quite the opposite, the Fifth Circuit's opinion is fact-specific to this case and provides no new or extended legal principles that might set precedent for other cases; therefore, it does not warrant review by the Court. To hold otherwise would upset the settled expectations of Shell, and litigants across the country. This is exactly the reason Congress explicitly chose not to retroactively apply the four (4) year "catch-all" statute of limitations contained in 28 U.S.C. § 1658(a) to claims available prior to the Judicial Improvements Act of 1990. *See* H.R. Rep. No. 101-734, 1990 U.S.C.C.A.N. 6860, 6870 (1990).

In sum, none of the criteria warranting the U.S. Supreme Court's review is present in the Petition. Therefore, Respondent Shell respectfully requests the Court to deny the Petition for Writ of Certiorari.

A. The Applicable Statute Of Limitations To Petitioner's Failure-To-Promote Claim Under 42 U.S.C. § 1981 Is Two (2) Years

Petitioner attempts to inflate this case into one presenting a profoundly important federal question regarding the application of "borrowed" statutes of limitation to causes of action under 42 U.S.C. § 1981; but, it is truly nothing of the sort. In reality, this matter has already been considered by this Court.[3] Despite Petitioner's efforts to obscure the present issue, the ultimate answer is clear: his claim was subject to a two (2) year limitation period and was, therefore, properly barred by the Fifth Circuit as being untimely.

1. Claims Under 42 U.S.C. § 1981 Are Subject To A Dual Statute Of Limitations

The Judicial Improvements Act of 1990 § 313, 28 U.S.C. § 1658 (the "Act") drastically changed the scope of claims filed under 42 U.S.C. § 1981, as

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[3] *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 124 S. Ct. 1836, 158 L. Ed. 2d 645 (2004).

amended by the Civil Rights Act of 1991, 105 Stat. 1071. Prior to the Act, causes of action available under § 1981 were subject to "the most appropriate or analogous state statute of limitations." *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 660, 107 S. Ct. 2617, 96 L. Ed. 2d 572 (1987). The Act created a four (4) year "catch-all" statute of limitations to be applied to a narrow class of federal statutes that were enacted after December 1, 1990, including claims brought under the Civil Rights Act of 1991 for alleged violations of 42 U.S.C. § 1981.

Petitioner acknowledges, as he must, that claims under § 1981 are subject to dissimilar statutes of limitation depending on the nature of the underlying claim. The standard for determining which limitation period applies to a particular cause of action was clearly enunciated by the Court in *Jones v. R.R. Donnelley & Sons Co.*:

> We conclude that a cause of action "aris[es] under an Act of Congress enacted" after December 1, 1990 – and therefore is governed by § 1658's 4-year statute of limitations – if the plaintiff's claim against the defendant was made possible by a post-1990 enactment. That construction best serves Congress' interest in alleviating the uncertainty inherent in the practice of borrowing state statutes of limitations while at the same time protecting settled interests. It spares federal judges and litigants the need to identify the appropriate state statute of limitations to apply to *new* claims but leaves in place the "borrowed"

> limitations periods for pre-existing causes of action, with respect to which the difficult work already has been done.

541 U.S. at 382 (emphasis added). According to *Jones*, a dual limitations period applies to § 1981 claims; the first of which to claims that were available prior to December 1, 1990, the second to claims which arise under an act of Congress signed into law after December 1, 1990. While the second scenario deems such claims to be subject to 28 U.S.C. § 1658's four (4) year statute of limitations, the first requires federal courts to "select the most appropriate or analogous state statute of limitations." *Goodman*, 482 U.S. at 660.

The Court's holding in *Jones* precisely expresses the intent of Congress in enacting the Judicial Improvements Act of 1990 § 313, 28 U.S.C. § 1658. As the Federal Courts Study Committee Implementation Act of 1990 noted regarding § 313 of the Act:

> [W]ith respect to many statutes that have no explicit limitations provision, the relevant limitations period has long since been resolved by judicial decision, with the applicable period decided upon by the courts varying dramatically from statute to statute. Under these circumstances, *retroactively imposing a four year statute of limitations on legislation that the courts have previously ruled is subject to a six month limitations period in one statute, and a ten year period in another, would threaten to disrupt the settled expectations of a great many parties*. Given that

> settling the expectations of prospective parties is an essential purpose of statutes of limitation, the Committee was reluctant to apply this section retroactively without further study to ensure that the benefits of retroactive application would indeed outweigh the costs.

H.R. Rep. No. 101-734, 1990 U.S.C.C.A.N. 6860, 6870 (emphasis added). In an effort to evade *Jones* and the legislature's express intent provided above, Petitioner boldly argues:

> [F]ederal courts are now indulging in the practice of making factual determination regarding when a promotion does or does not rise to the level of an opportunity for a new and distinct relation between the employee and the employer in deciding whether the federal or state statute of limitations applies to a claimant's denial of promotion claim under 42 U.S.C. § 1981. *It was not Congress' intent when it enacted 28 U.S.C. § 1658(a) that federal courts indulge in making factual determinations regarding whether the federal or state statute of limitations applies to claims brought under 42 U.S.C. § 1981.*

Petition 7 (emphasis added). However, Petitioner's argument stands in direct opposition to the explicit intent of Congress; and, contradicts the Court's holding in *Jones*:

> Respondent argues that the question whether a plaintiff's cause of action would have been viable prior to a post-1991 amendment will

> be particularly complicated in cases in which there was a split of authority regarding the scope of the original statute. In such cases, courts will have to determine whether the amendment clarified existing law or created new rights and liabilities. Such analysis is hardly beyond the judicial ken: Courts must answer precisely the same question when deciding whether an amendment may be applied retrospectively. The substantial overlap between the retroactivity and statute-of-limitations inquiries undermines respondent's claim that application of § 1658 to post-1991 amendments will generate additional work for federal judges.

Jones, 541 U.S. at 385 n. 18 (internal citations omitted).

Despite these certainties, Petitioner attempts to re-shape the intent of Congress in passing the Act and reverse this Court's holding in *Jones* to correspond to his facts. However, absent a special justification, the Court is compelled by *stare decisis* to adhere to its established interpretations of law. *Patterson*, 491 U.S. at 164. "The burden borne by a party advocating the abandonment of an established precedent is greater where the Court is asked to overrule a point of statutory construction, which, unlike constitutional interpretation, may be altered by Congress." *Id.* Petitioner has failed to establish a "special justification" for the Court to abandon its decision in *Jones*, or the intent of Congress, regarding the Act. Accordingly, the instant Petition should be denied.

2. Petitioner's Failure-To-Promote Claim Was Available Prior To The Enactment Of 28 U.S.C. § 1658

Petitioner has not sought Certiorari to review the Fifth Circuit's holding that the promotion he sought was new and distinct. However, he *did* make a faint reference to the "erroneous factual determination" of the Court in reaching this conclusion. Petition 8. Approaching this assertion with an abundance of caution, the following discussion addresses the propriety of the lower courts' determination and argues it is not appropriate for this Court's review.

Recognizing that claims under 42 U.S.C. § 1981 are subject to a dual statute of limitations depending on the nature of the underlying claim, the operative question in such litigation hinges on whether the cause of action was made possible by the Civil Rights Act of 1991 or if the claim was available prior to its enactment.

In *Patterson*, this Court addressed the peculiarities of a failure-to-promote claim under 42 U.S.C. § 1981. Considering the issue, the Court stated, "[b]y its plain terms, the relevant provision in § 1981 protects two rights: 'the same right . . . to make . . . contracts' and 'the same right . . . to . . . enforce contracts'. . . . The statute prohibits, when based on race, the refusal to enter into a contract with someone." 491 U.S. at 176. Applying this general proposition, the Court further stated:

> [T]he question whether a promotion claim is actionable under § 1981 depends upon whether the nature of the change in position was such that it involved the opportunity to enter into a new contract with the employer. If so, then the employer's refusal to enter the new contract is actionable under § 1981.

Id. at 185. According to the clear terms of *Patterson*, "[o]nly where the promotion rises to the level of an opportunity for a new and distinct relation between the employee and the employer is such a claim actionable under § 1981." *Id. Patterson* recognized that a cause of action for failure-to-promote existed prior to the enactment of the Civil Rights Act of 1991 when the promotion was considered to be a "new and distinct" relationship (similar to the promotion currently at issue).

With *Patterson* as its guide in the instant litigation, the Fifth Circuit acknowledged, "[a] promotion that would allow an employee to hire and fire subordinates is the type of relationship that creates a new and distinct employment relationship. . . . Therefore, the two-year Texas statute of limitations applied. . . . These claims are therefore barred." App. 8a. The Circuit Court's conclusion is based directly on this Court's reasoning in *Patterson*, and is consistent with the law of other Circuit Courts.

Petitioner attempts to avoid the inescapable effect of *Patterson* on his case (dismissal) by arguing that the language cited above was dicta. By so doing, he seeks to erase a multitude of jurisprudence

applying this Court's reasoning, including that of the Fifth Circuit.[4] However, the truth remains: Petitioner has failed to raise a "compelling reason" for this Court to grant his Petition. A split does not exist in the Circuit Courts, nor has one been asserted by the Petitioner. Furthermore, the Fifth Circuit's decision does not evince a departure from this Court's reasoning in *Patterson*. On the contrary, the Fifth Circuit correctly applied *Patterson*, and the applicable two (2) year statute of limitations, to Petitioner's cause of action under § 1981. Accordingly, the Petition should be denied.

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[4] Second Circuit: *Hawkins v. 1115 Legal Service Care*, 163 F.3d 684, 693 (2nd Cir. 1998); Seventh Circuit: *Watson v. Electro-Motive Div. of General Motors Corp.*, 1996 WL 5536, 2 (7th Cir. 1996); Eighth Circuit: *Kim v. Nash Finch Co.*, 123 F.3d 1046, 1055 (8th Cir. 1997); Ninth Circuit: *Odima v. Westin Tucson Hotel*, 53 F.3d 1484, 1494 (9th Cir. 1995); Tenth Circuit: *Cross v. The Home Depot*, 390 F.3d 1283, 1290 (10th Cir. 2004); Eleventh Circuit: *Price v. M & H Valve Co.*, 177 Fed.Appx. 1, 10 (11th Cir. 2006).

VI. CONCLUSION

For the foregoing reasons discussed herein, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

A. MARTIN WICKLIFF*
JENNIFER J. COOPER
DANIEL J. SCHUCH
EPSTEIN BECKER GREEN WICKLIFF & HALL, P.C.
1000 Louisiana Street, Suite 5400
Houston, Texas 77002
Telephone: (713) 750-3100
Facsimile: (713) 750-3101

**Counsel of Record*

Counsel for Respondents Shell Oil Co. and Shell Information Technology International Inc.

Dated: January 8, 2009